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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

NO. 454

FRANK STONER and IRENE STONER,
Petitioners

vs.

CHARLES BELLOWS and DOWNING & BELLOWS CO., LTD., *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WARREN H. YOUNG
Counsel for Respondents

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CHARLES BELLOWS and DOWNING & BELLOWS CO., LTD.,
Respondents

Brief in Opposition to Petition for Writ of Certiorari

STATEMENT

Due to the many inaccuracies and omissions in petitioners' statement, respondents find it necessary to restate the facts:

Petitioners, Irene and Frank Stoner, learned that the retail liquor division of the respondent corporation was for sale. Respondent corporation, a Virgin Islands corporation, was at that time engaged in the general wholesale and retail liquor and other general produce business in St. Thomas. They met Charles Bellows (who owned or controlled about 60% of respondent corporation's stock) and negotiations were started. Stoner asked for figures of the business but advised that actual figures were not readily available since the corporation kept only one integrated set of books for both its wholesale and retail sales. (Trans. 20, 129, R. 87)

Stoner then wrote a letter asking for approximate figures. (Ex. B, Trans. 21, Appendix A to this brief). As requested, Bellows furnished Stoner a rough estimate of the retail division's gross income, expenses and net profit along with a

memorandum of their conversations to date. (Trans. 129; Ex. 2, R. 12). The figures showed an estimated annual gross retail sales of $60,000, estimated gross profit of $15,000, approximate expenses of $4,767.44 and approximate net profit of $10,232.56.

After examining the figures, Stoner sent a letter criticizing the computations and pointing out that the net profit would actually be less if one were to take into consideration other expenses, such as additional wages, depreciation, etc. However, he went on to state that he was nonetheless determined to buy the business. (Trans. 24; Ex. 3; R. 15). The parties then executed a lease prepared by their mutual attorney (Ex. 7; R. 23) which bound the business until Stoner could raise the purchase price and close the sale.

Concurrent with the execution of the lease, Stoner submitted a formal offer to purchase the business, (Ex. 8; R. 26) and then he left for New York to close his business there and make arrangements to move to St. Thomas. (Trans. 11). While in New York, there was an exchange of correspondence regarding the proposed name for the business, the type of business organization, and books and stationery needed, all of which indicated that the petitioners could and would use the name "Bellows" as part of a corporation name. (Ex. 9, "C," R. 28, 107). This was also the Finding of the two courts below. (Finding No. 8, R. 91, and Judge Staley's Opinion, R. 114).

After the Stoners returned to St. Thomas in October, 1950, the respondent corporation held a stockholders' meeting and tendered a counter-offer to Stoner's offer, and this was accepted in writing by Stoner on November 16. (Ex. 11, R. 105-106). This offer, counter-offer and acceptance constituted the contract upon which this suit is based. (Finding of Fact No. 3, R. 99, Judge Staley's Opinion, R. 111).

The Stoners took over the business as their own on November 15, and operated it, not as a corporation, but as a partnership under the firm name of "Stoner & Bellows." Shortly thereafter, Stoner was advised of certain legal objections to the use of the name "Bellows" in a partnership style of name. (Trans. 28). A limited partnership was suggested by their mutual attorney to protect Bellows from the liabilities of an implied general partnership but this suggestion was rejected by both parties. (Trans. 28, 180). On January 17, Bellows requested Stoner to discontinue using the name "Stoner & Bellows" unless the business was incorporated or unless "Bellows" was used in such manner as to negative any partnership between Bellows and Stoner. (Ex. 17, R. 35).

Because of certain differences and unpleasantries between the parties, respondent corporation vacated the small space it had retained in the retail store. (Trans. 142). However it continued to sell liquor to Stoner at its lowest wholesale price, but for cash only. (Trans. 32, 76, 77).

In February, 1951, after respondents reiterated their objection to Stoner's use of the name "Stoner & Bellows" without being incorporated, (Ex. "H", R. 12), this action was filed by Stoner. Irene Stoner, being a partner of "Stoner & Bellows," was later impleaded as an involuntary plaintiff.

In petitioners' statement of the case, it is stated that "At the close of the trial the Court rendered its opinion immediately from the bench . . . ". We state the fact to be that the trial was concluded on April 23; and four days later, after hearing the arguments of counsel, the judge rendered a carefully prepared nine page opinion (R. 87-96). This can hardly be considered "a snap judgment . . . without adequate reflection or deliberation," as so stated in the Petition.

ARGUMENT

1. PETITIONERS HAVE FAILED TO SUBSTANTIATE AND SUPPORT THEIR TWO ASSIGNED ERRORS.

A. Contrary to the statement in Assigned Error 1, the Circuit Court of Appeals *did consider* the questions of divisibility of the contract and the invalidity of clauses 4, 5 and 6 of the contract.

The opinion of Circuit Judge Staley is as follows (italics for emphasis are ours):

> "In their complaint plaintiffs seek damages for breach of contract, and the case was tried below on that theory. In this court for the first time plaintiffs now present a brand new theory and a request for a new kind of relief. They ask this court to cancel the entire contract with the exception of that portion dealing with the sale of the inventory and fixtures. Their object, of course, is to be relieved of the continuing obligation to pay agreed percentages of their gross sale to defendant corporation. (Paragraph 4 of the contract). While plaintiffs have not conceptualized their new theory, the relief they now request is really in the nature of a declaratory judgment discharging them from any liability for failure to pay the agreed percentages of gross sales because of an alleged failure of consideration on the part of defendants. See 5 Williston on Contracts - 1454 A, p. 4063 (Rev. Ed.). In addition, plaintiffs assert that the contract (with the exception of those portions dealing with the sale of the inventory and fixtures) is unenforceable because of uncertainty.
>
> We think that, except in an extraordinary case, an appellant should not be allowed to demand a new

kind of relief based on a theory not asserted below. See Hormel v. Helvering, 312 U.S. 552, 556 (1941); Eliscu v. Fiber, 157 F. 2d 133, 140 (CA. 3, 1946). *Since we must review the record de novo in this appeal, * however, we have examined the evidence and we find no such material breach which would warrant us in holding that plaintiff's obligations under the contract are discharged. Moreover, there is no merit in the assertion that the contract is unenforceable because of uncertainty."*

* *Burch v. Burch*, F. 2d (C.A. 3, decided Apr. 16, 1952); *Callwood v. Kean*, 189 F. 2d 565, 581 (C. A. 3, 1951).

B. Contrary to the statement in Assigned Error 2, there is no evidence or finding that the transfer of the goodwill of the retail division of respondent corporation was in violation of an ordinance of the Virgin Islands.

1. The Virgin Islands statute which petitioners argue prohibited respondent corporation from selling its retail division, is pertinent only to a complete dissolution of a corporation and the winding up of a corporation's business. (The statute in question is set out in full in Petitioner's brief, p. 6).

2 The Articles of Incorporation of respondent corporation clearly authorize and empower the corporation to engage in the wholesale and/or retail business and to acquire or sell or liquidate in whole or in part any business acquired by the corporation.

Petitioners have merely stated that the Articles of Incorporation prohibit the sale of the retail business but they do not show wherein such prohibition is found. (Petitioner's brief p. 14). An examination of Article Second, sub paragraphs (a) and (f), will show that the opposite is true, that is, that such

a sale and consequent limitation of business to the wholesale field alone were definitely within the enumerated powers and purposes of the corporation. Respondent corporation had not precluded itself from continuing the business for which it was created.

II. THE PETITION FOR CERTIORARI LACKS SUBSTANTIAL GROUNDS.

A. The decision of the Court of Appeals for the Third Circuit is sought to be reviewed entirely upon an appreciation of the particular facts involved and upon the construction of a particular contract.

1. Petitioners argue that the contract is severable, that part is valid; part, invalid. However, neither of the two courts below found any evidence by which to hold the contract void in whole or in part, and therefore, there was no need to decide the divisibility of the contract.

2. By paragraphs 4 and 5 of their argument, petitioners are apparently requesting this Court to examine the facts of certain cited cases and determine thereby that there was no value to the goodwill transferred to petitioners by respondent corporation. We cannot follow that argument; nor is there any showing that the two courts below made error in failing to find any fraud, misrepresentation, lack of consideration or failure of consideration.

3. The arguments and cases cited by petitioners in paragraphs 6, 7, and 8 are all clearly distinguishable from the instant case of their facts. The arguments do not involve any alleged conflict in application of principles of law.

B. The Supreme Court will not grant certiorari to review evidence and discuss specific facts.

General Talking Pictures Corp. v. Western Electric Co., 304 US 175, 58 S. Ct. 849, 82 L. Ed. 1273 (1937)

Mc Elwain, The Business of the Supreme Court as Conducted by Chief Justice Hughes (1949) Harvard L. Rev. 5, 13, n. 14.

C. The Supreme Court will not grant certiorari merely to settle matters of a private interest or to give the party defeated in the courts below another hearing.

Forsyth v. Hammond, 116 U. S. 506, 17 S. Ct. 665, 41 L. Ed. 1095 (1896)

Magnum Import Co., v. Coty, 262 U.S. 159, 43 S. Ct. 531, 67 L. Ed. 922. (1922)

D. Findings of fact concurred in by two lower courts will be accepted by the Supreme Court unless clear error is shown.

Faulkner v. Gibbs, 338 U.S. 267, 70 S. Ct. 25, 44 L. Ed. (1949)

Comstock v. Group of Institutional Inventors, 335 U.S. 211, 69 S. Ct. 1454, 92 L. Ed. 1911 (1948)

In the instant case, the Court of Appeals affirmed the trial court's findings in all respects except as to the matter of competition in the wholesale field by petitioners, which matter was never put in issue by either of the parties. The petitioners have not pointed out any error wherein the two lower courts found no fraud or misrepresentation, that the contract was valid; that the contract was enforceable; that there was no failure of consideration; that petitioners were not prohibited from using the name "Bellows," but were merely requested to use it in the manner and form agreed upon.

CONCLUSION

Since there is no argument that the decision of the Court below has decided a question of law in conflict with applicable local decisions; or that there is an important question of federal law that should be decided by this Court; or that the Court below has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision, it is respectfully submitted that the petition lacks sufficient grounds for a writ of certiorari and should be denied.

Dated: Christiansted, St. Croix, March 18, 1953.

Respectfully submitted,

WARREN H. YOUNG
Counsel for respondents

BROOKHURST'S PRINTERY - ST. CROIX

CERTIORARI

DENIED